tions equipment products. In addition the BOCs now, under the Telecommunications Act, face competition in their local networks to an extent that was undreamt of in Bell System days, drastically curtailing any incentive to use the local network to leverage sales to a captive manufacturer, since the purchase of inferior or overpriced telecommunications equipment would surely lead to competitive losses in local exchange service. Accordingly, the Commission need not add further disclosure requirements under Section 273 for manufacturing to those stringent network disclosure rules it has already established for network interconnection.

B. *The "Tension" Between Collaboration and Disclosure Exists Only in the Case of the BOC's Manufacturing Affiliate.*

In ¶ 27 of the NPRM, the Commission refers to the "tension" between Section 273(b)(1), which permits the BOCs to engage in "close collaboration with any manufacturer of customer premises equipment or telecommunications equipment,"[24] and Section 273(c)(1), which contains the general manufacturing information disclosure requirement. The Commission says it seeks to "prevent 'close collaboration' from resulting in the communication of technical information and

[24] See full text of Section 273(b) quoted in note 12, *supra*.

protocols in advance of the disclosure requirement" and adds that its "concern is based upon the potential for a BOC or BOC affiliate (which could include another LEC or group of affiliated LECs) to have a competitive advantage through such 'close collaboration,' *e.g.*, access to network information that would be unavailable or not available in a timely manner to other competitors."

Ameritech observes, first of all, that if Ameritech is correct in arguing that the provisions of Section 273(c) do not apply to a BOC unless and until that BOC is actually engaged in telecommunications equipment manufacturing, then the conflict between Section 273(b)(1) collaboration and Section 273(c)(1) disclosure never arises until the grant of manufacturing authority occurs. Of course it is in the period before its own manufacturing relief is obtained that a BOC can be expected to make the most significant use of its opportunity to collaborate with manufacturers. The tension identified by the Commission is of no significance during this period.

Moreover, after the BOC has obtained its relief from the manufacturing restriction, the Commission's fear that the BOC's own Section 272 manufacturing affiliate will obtain early access to that BOC's network information under the guise of "collaboration" with the BOC can be prevented by specifying a rule that the *affiliated* manufacturer cannot obtain early information in this manner.

On the other hand, if the BOC is authorized to engage in manufacturing and is employing a Section 272 affiliate to do so, but for some reason elects to continue to "collaborate" with unaffiliated manufacturers, no harm would be done to the purposes of Section 273 or the overall competitive objectives of the Telecommunications Act if the "tension" were resolved in the opposite direction, *i.e.*, by allowing the information to be made available to the collaborating unaffiliated manufacturer even it is not yet available to other manufacturers — including, of course, the BOC's own Section 272 manufacturing affiliate. Congress in Section 273(b)(1) has not merely allowed for collaboration, but *close* collaboration, and the correct way to read the two sections together is to recognize that collaboration was intended to prevail over the information disclosure requirements in every case except where it is the BOC's own affiliate reaping the advantage of early disclosure — which is, of course, the root of the Commission's concern in ¶ 27. Accordingly, the "tension" between the network disclosure rules and the rule permitting collaboration with manufacturers should be resolved in favor of collaboration where the collaborating manufacturer is not the BOC's own Section 272 affiliate.

IV. General Manufacturing Safeguards Under Section 273(d)

A. Section 273(d)(4)(A) Should Be Narrowly Construed.

Section 273(d)(4)(A) sets forth a rather elaborate procedure for a "Section 273(d)(A) entity"[25] when that entity establishes and publishes any industry-wide standard, generic requirement, or substantial modifications thereto for telecommunications equipment or customer premises equipment. Section 273(d)(4) entities must, among other duties, issue public notices, invite interested parties to participate, publish preliminary texts for comment, and publish a final text of the industry-wide standard or generic requirement.[26]

At ¶ 50 of the NPRM, the Commission observes that Section 273(d)(4)(A) potentially could encompass a wide range of entities or alliances of entities. The Commission seeks comment on the extent to which this provision should apply to research, development, or adoption of standards or generic requirements by large carriers, other

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[25] A "Section 273(d)(4) entity" is an entity that is not an accredited standards development organization and that establishes industry-wide standards or industry-wide generic network requirements for telecommunications equipment or customer premises equipment or that certifies such equipment manufactured by unaffiliated entities. 47 U.S.C. § 273(d)(4).

[26] 47 U.S.C. § 273(d)(4)(A).

entities, or alliances. In response to the Commission, Ameritech offers the following comments.

First, Ameritech notes that the Commission suggests in Paragraph 50 that the requirements of Section 273(d)(4)(A) extend to "specifications" developed by an entity purchasing telecommunications or customer premises equipment. Ameritech disagrees. There is neither a statutory basis nor a legislative history supporting the inclusion of equipment "specifications" within the scope of Section 273(d)(4).

Second, the requirements of Section 273(d)(4)(A) would appear to apply only to legal entities. The statutory language and legislative history do not evidence any intention to extend the onerous duties of this provision to informal groups or project-specific joint purchasing activities. To do so would impose the requirements of Section 273(d)(4)(A) well beyond their intended scope, thereby including conduct which has neither the intent nor the effect of establishing industry-wide standards or generic requirements.

Third, the requirements of Section 273(d)(4)(A) should not apply to entities merely developing product requirements for their own equipment purchases. In these cases, specific product requirements are being developed. The entity or entities purchasing the equipment have no intent to enact, publish, or mandate industry-wide standards or generic requirements for telecommunications or customer premises

equipment. Indeed, these entities may wish to develop a unique technology, not an industry-wide one, in order to create or maintain a competitive advantage.

Fourth, Section 273(d)(4)(A) should not be applicable to instances in which an entity or group of entities does not develop industry-wide standards or generic requirements but merely references existing standards and generic requirements established by other organizations. Such referencing is commonplace within the request-for-proposal process. In this case, no new standards or generic requirements are developed. Entities not part of the purchasing group have not been excluded from any standard-setting activity since none has occurred.

Fifth, an overly broad application of Section 273(d)(4)(A) could retard or eliminate considerable research and development, innovation, and other pro-competitive activity. The public disclosure required by Section 273(d)(4)(A) will serve as a considerable disincentive to innovation since the "first adopter" advantage will be difficult, if not impossible, to attain. Moreover, the delays inherent in the public notice, comment, and final text procedures set forth in Section 273(d)(4)(A) will substantially slow the development of new services and products. The so-called "free riders" will get just that, a free ride on the backs of industry innovators and pioneers.

Finally, a narrow reading of the scope of Section 273(d)(4)(A) will not create a regulatory or enforcement "hole" with respect to standard-setting or certification. The antitrust laws remain a powerful tool in combating anti-competitive activity in this arena. Private plaintiffs and government agencies have consistently challenged and frequently enjoined joint conduct by industry members which excludes or otherwise injures rival firms.[27] Redundant FCC regulation will provide no additional benefits and, as noted above, may substantially reduce innovation.

B. The Commission Should Narrowly Construe Product Certification Under Section 273(d)(4)(B).

At Paragraph 55, the Commission seeks comment on Section 273(d)(4)(B). This provision sets forth procedures that a Section 273(d)(4) entity must follow when it "engages in product certification for telecommunications equipment or customer premises equipment manufactured by unaffiliated entities." In short, Section 273(d)(4)(B) requires such certifications to be conducted

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[27] See generally, AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS (Third), pp. 86-90; Valerics, ANTITRUST BASICS, § 6.12

pursuant to published, auditable criteria and to be based upon industry-accepted testing methods and standards.[28]

The requirements imposed by Section 273(d)(4)(B) upon entities engaging in product certification for telecommunications and customer premises equipment appear to be reasonable and workable. Ameritech does, however, recommend that the phrase "product certification" be defined in its traditional sense, *i.e.*, to encompass the same type of product review, testing, and grading undertaken by accredited standards development organizations like the American National Standards Institute (ANSI) and Underwriters Laboratories (UL). At the very least, the Commission should conclude that an entity or group of entities that develops product requirements for the purchase of telecommunications or customer premises equipment is not engaged in product certification for the purposes of Section 273(d)(4)(B).

C. *No Rules Are Needed To Define Monopolization Under Section 273(d)(4)(C).*

At ¶ 56 of the NPRM, the Commission seeks comment on Section 273(d)(4)(C). This provision prohibits a Section 273(d)(4) entity from

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[28] 47 U.S.C. § 273(d)(4)(B)

undertaking "any actions to monopolize or attempt to monopolize the market for such services."

Initially, it is not clear whether the prohibition relates to the market for standards-setting and certification or the underlying market for the manufacture of equipment. Use of the word "services" suggests the former, but the Commission should determine this question.

However, regardless of the answer to the question posed above, Ameritech recommends that the Commission refrain from any further rulemaking to supplement Section 273(d)(4)(C). Enumeration of specific acts constituting violation of Section 273(d)(4)(C) and their corresponding penalties is unnecessary. Judging the existence of monopolization or attempted monopolization is an intensive, fact-specific exercise. The ultimate determination is invariably based on unique questions relating to intent, market definition, market power, and competitive effect. Just as the Department of Justice and Federal Trade Commission have enforced the monopolization and attempted monopolization provisions of Section 2 of the Sherman Act on a case-by-case basis, so too should the Commission enforce the proscriptions of Section 273(d)(4)(C).

D. The Commission Should Refrain from Defining the Term "Preferential" in Section 273(d)(4)(C).

At ¶ 57 of the NPRM, the Commission seeks comment on how best to implement Section 273(d)(4)(D). This provision states that a Section 273(d)(4) entity shall not "preferentially treat its own telecommunications equipment or customer premises equipment, or that of its affiliate, over that of any other entity in establishing and publishing industry-wide standards or industry-wide generic requirements for, and in certification of, telecommunications equipment and customer premises equipment." Specifically, the Commission asks how the phrase "preferential treatment" should be defined and whether rules should be adopted which list activities that constitute prohibited "preferential treatment."

As in the case of Commission determinations of monopolization and attempted monopolization under Section 273(d)(4)(C), Ameritech recommends that the Commission refrain from adopting any rules defining the term "preferential" or enumerating activities that would constitute preferential conduct. Whether a Section 273(d)(4) entity's conduct constitutes a prohibited preference will turn on the specific facts of each case. Codified definitions will only postpone the inevitable case-by-case determination.

However, Ameritech does request that the Commission make clear that a violation of Section 273(d)(4)(D) is not committed merely

because (1) an affiliate of a Section 273(d)(4) entity (or the entity itself) benefits from the establishment of a standard or the certification of equipment and (2) certain unaffiliated entities are unsuccessful in seeking the same benefit. This situation should not constitute a Section 273(d)(4)(D) violation as long as the differential treatment is a product of the application of reasonable and objective criteria that are uniformly administered. To hold otherwise would render virtually every selective process (*e.g.*, standard-setting, certification, competitive bidding) an actionable preferential or discriminatory activity if some of the aspirants are unsuccessful.

V. Section 273(e): BOC Equipment Procurement and Sales

Section 273(e) governs BOC practices in procuring and selling telecommunications equipment. Ameritech has already explained why the provisions of 273(e) do not apply to a BOC unless and until that BOC is actually engaged in manufacturing. Thus, the following discussion is limited to the interpretation of Section 273(e) as it may apply after manufacturing authority has been obtained.

A. *No Further Definition of the Term "Consider" Is Necessary or Appropriate in Section 273(e)(1)(A).*

The Commission first asks (NPRM at ¶ 65) whether there is any special meaning to the word "consider" as it is used in Section

273(e)(1)(A).[29] Ameritech responds that the word "consider" was deliberately chosen to exclude the requirement of a formal bidding process for the procurement of every product, and no further expansion of the term is necessary or appropriate.

B. A Manufacturer Paying Royalties to the BOC Is Not a "Related Person" in Section 273(e)(1).

The Commission also asks (¶ 67) who might be a "related" person within the meaning of the requirement of Section 273(e)(1) not to discriminate in favor of "equipment produced or supplied by an affiliate or related person." In particular, it asks whether a royalty agreement between a BOC and a manufacturer would be enough to make that manufacturer a "related person." However, Congress has shown, in Section 272(b)(2)(B), that it was perfectly capable of referring by name specifically to "royalty agreements with manu-

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[29] Section 273(e)(1) provides:

NONDISCRIMINATION STANDARDS FOR MANUFACTURING — In the procurement or awarding of supply contracts for telecommunications equipment, a Bell operating company, or any entity acting on its behalf, for the duration of the requirement for a separate subsidiary including manufacturing under this Act--

(A) shall consider such equipment, produced or supplied by unrelated persons; and

(B) may not discriminate in favor of equipment produced or supplied by an affiliate or related person.

facturers of telecommunications equipment" when that was what it meant, so there is no reason to suppose that it would have resorted to the highly unspecific phrase "related person" in Section 273(e)(1) to mean those very same manufacturers who have royalty agreements. In other words, if Congress had meant royalties, it would have said royalties, and not referred vaguely to some sort of relationship. Accordingly, a manufacturer paying royalties to the BOC is not a "related person" solely for that reason. What "related persons" *does* refer to in Section 273(e)(1) is manufacturers in whom the BOC has an equity interest that is *less* than that necessary to be a true "affiliate."

C. "Equipment" in Section 273(e)(2) Is Limited to Telecommunications Equipment and CPE.

In regard to Section 273(e)(2),[30] which requires objective procurement of "equipment, services, and software," the NPRM (at ¶ 68) seeks definitions of the three quoted words. In particular, it asks whether "equipment," in this context, should be limited to telecommunications equipment and customer premises equipment.

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[30] Section 273(e)(2)provides:

PROCUREMENT STANDARDS- Each Bell operating company or any entity acting on its behalf shall make procurement decisions and award all supply contracts for equipment, services, and software on the basis of an objective assessment of price, quality, delivery, and other commercial factors.

Ameritech submits that the same considerations which led to the conclusion that the procurement rules do not begin to apply until manufacturing authority is obtained also compel inexorably the result that those rules apply only to telecommunications equipment and customer premises equipment, because those are the only types of equipment for which special permission under Section 273 is necessary. If the terms "equipment, services, and software" were not intended to limit the scope of this section, Congress would have merely said the BOC shall make procurement decisions on an objective basis, without reference to the category of procurement decision, since all procurement is either of equipment or of a service. The fact that Congress specified these three categories, and the fact they are discussed in a manufacturing context, indicates they refer to telecommunications equipment, services performed on such equipment, and software integral to the operation of such equipment.[31]

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[31] Furthermore, if objection is made that this reading departs from a "literal" reading of Section 273(e)(2), the answer is that under the way Section 273 has been written, even the basic prohibition against BOC telecommunications equipment manufacturing is itself not stated literally in the statute, but must be implied from the circumstances, as discussed on p. 4, *supra*, so it is not at all stretching the language to say that the "equipment" in Section 273(e)(2) must be telecommunications equipment, because that is what is plainly implied by the scope of Section 273 as a whole.

Also, Congress must be presumed to have been well aware that the BOCs have never engaged in significant manufacturing of non-telecommunications equipment, such as earthmoving equipment or restaurant equipment, despite the fact that they could have manufactured such products during most of the fifteen years the AT&T decree was in effect.[32] Under such circumstances it would be remarkable that Congress could have found that the BOCs, even while voluntarily remaining out of the earthmoving equipment manufacturing business, had so abused the existing manufacturers that special Congressional remedies were necessary to protect them in the BOC procurement process. It is even more remarkable to imagine that Congress could have digressed to make such sweeping findings, in an area so far removed from the central subject of the telecommunications law, without even a trace of them finding their way into the debates or the

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[32] As originally entered, the AT&T decree, in addition to imposing the interexchange telecommunications, information services, and telecommunications equipment manufacturing restrictions, also contained a general restriction that forbade the BOCs to "provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff." However, that restriction was removed on Sept. 10, 1987, *see* United States v. Western Elec. Co., 673 F. Supp. 525 (D.D.C. 1987), *rev'd on other grounds*, 900 F.2d 283 (D.C. Cir. 1990), *cert. denied sub nom.* MCI Communications Corp. v. United States, 498 U.S. 911, and the BOCs ever since have been able to engage in the manufacturing of anything that is not telecommunications equipment or customer premises equipment.

legislative history. Plainly, then, the scope of the "equipment" subject to Section 273(e)(2) limited to telecommunications equipment and customer premises equipment, since it is only the other manufacturers of those categories of equipment who are likely to be affected by anything that is granted to the BOCs or their affiliates under the new law. For the same reasons, of course, the only "services" subject to Section 273(e)(2) are those services (such as maintenance or employee training) that a manufacturer customarily provides in connection with the supplying of telecommunications equipment and customer premises equipment, and the "software" subject to that subsection is limited, as the NPRM suggests, to the software that is integral to the operation of those types of manufactured equipment. Finally, there is no reason to believe that Congress wanted the Commission to become immersed in a BOC's purchase of non-telecommunications equipment or non-telecommunications services, such as pens or janitorial services.

D. No New Rules Are Needed To Interpret the Joint Network Planning Requirements of Section 273(e)(3).

In the NPRM (at ¶ 70), the Commission asks whether rules need to be promulgated to interpret or enforce the joint network planning and

design requirements of Section 273(e)(3).[33] Ameritech responds that there should be no rules to enforce that provision at this time. In the first place, for the reasons already discussed, Section 273(e)(3), like many other subparts of Section 273, does not even take effect until a BOC is authorized to manufacture telecommunications equipment. Moreover, even after it does take effect, Section 273(e)(3)'s rules should be limited to particular circumstances where the BOC might be able to wield some special advantage over competing local exchange carriers by reason of the fact that the BOC had been authorized, and had elected, to manufacture telecommunications equipment for its own local exchange network. Otherwise, there would be no conceivable reason why this provision is found mixed in with the manufacturing provisions of the Act, and none is supplied by the legislative history.

Moreover, the application of Section 273(e)(3) is dependent upon the important qualification that the BOC's obligation extends as far as "to the extent consistent with the antitrust laws." What is or is not

[33] Section 273(e)(3) provides: "A Bell operating company shall, to the extent consistent with the antitrust laws, engage in joint network planning and design with local exchange carriers operating in the same area of interest. No participant in such planning shall be allowed to delay the introduction of new technology or the deployment of facilities to provide telecommunications services, and agreement with such other carriers shall not be required as a prerequisite for such introduction or deployment."

permitted by the antitrust laws in a given case, especially in a case that might involve collusion between ostensible competitors, is not a question easily answered by either a black-letter rule in some treatise or in a set of rules promulgated long in advance by the Commission. For this reason the resolution of antitrust questions is usually best left for a case-by-case approach. This idea is reinforced by the fact that competition for local exchange service will be a brand new area of competitive activity where existing antitrust precedents may or may not be applicable. Moreover, as the NPRM (in ¶ 72) acknowledges, the Commission is also faced with the related task of interpreting Section 256 of the Act, which requires the Commission, *inter alia,* to establish "procedures for Commission oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service." Thus the question of joint network planning and design under Section 273(e)(3) can be taken up at some future time, if necessary, when it can be coordinated with the similar requirements of Section 256. It should be noticed that in contrast to some other parts of the Telecommunications Act of 1996, where Congress has insisted that Commission rules be promulgated on particular subjects and has often established strict timelines — for example, only 90 days was

allowed for the adoption of Commission rules governing an alternate dispute resolution process for industry-wide standards under Section 273(d)(5) — the law contains no mandate to the Commission to adopt rules interpreting Section 273(e)(3), other than the general permissive language of Section 273(g) that "The Commission *may* prescribe such additional rules and regulations as the Commission determines are necessary to carry out the provisions of this section" [italics added].

For these reasons, no new rules should be adopted to interpret the joint network planning requirements of Section 273(e)(3).

Respectfully submitted,

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